EUROPEAN PROFILES LTD.

v.

SENTINEL STEEL (MALAYSIA) SDN. BHD.

HIGH COURT, KUALA LUMPUR
DATO' V.C. GEORGE J.
[CIVIL SUIT NO. D3-22-1748-91]
30 JULY 1993

PRACTICE & PROCEDURE: Claim for costs of carriage etc. - Application for summary judgment under O. 14, RHC - Whether triable issues raised by defendant - Delay - Whether undue - Whether explanation of plaintiff acceptable - Notice of termination of agreement - Whether valid - Foreign law - Whether applicable - Amount claimed - Whether unreasonable - Conduct of defendant - Whether estoppel applicable - Allegation of previous cheating by plaintiff - Whether relevant.

By a written agreement dated 11 September 1985, the plaintiff had leased to the defendant certain specialised equipment for use in its business. The lease agreement was to be effective for a period of 3 years and thereafter either party was entitled to terminate it by giving not less than 3 calendar months notice to the other, as provided by clause 18(1). Clause 17 gave the plaintiff the right to terminate the agreement if there was imposed what was referred to as 'changes in the law' and if the parties could not agree to amendments to the agreement to meet such changes. Clause 18(2) provided that where the defendant failed to pay any sum due under the agreement on its due date or was in breach of any other term of the agreement, the plaintiff was entitled to terminate the agreement by serving a notice to that effect on the defendant. Clause 18(3) provided the defendant with a reciprocal right against the plaintiff. Clause 18(1) was to have no application if the agreement had been previously terminated pursuant to clause 17 or clause 18(2) or (3).

A term of the lease agreement was that English law was to apply.

By a notice dated 5 March 1991 (which was well after the initial 3 years of the lease agreement) the plaintiff purported to terminate the agreement with 'immediate effect'. The plaintiff purported to invoke clause 18(2).

The notice was hand delivered on 6 March 1991. On 6 May 1991, the parties reported to the Court that a settlement had been arrived at and by consent it was *inter alia* ordered that the defendant pay the plaintiff the sum claimed and that the defendant would effect delivery of the equipment. The order expressly reserved to the plaintiff the right to recover the costs of freight etc. It also provided that the remaining provisions of the lease agreement were to be terminated with effect from 31 May 1991. Soon after, the equipment was shipped to the United Kingdom by the plaintiff. The defendant was kept informed and he did not appear to have objected to the shipping agents or the ship used by the plaintiff to ship the equipment.

By a letter dated 28 October 1991, the plaintiff demanded payment of the sum of £10,707.91 as costs of shipment of the equipment. On receiving no reply, on 24 December 1991 the plaintiff caused a writ to be issued seeking judgment for the amount, interests and costs. An appearance was entered by the defendant and a statement of defence and counterclaim filed in January 1992. The plaintiff obtained leave to amend the statement of claim, and on 9 March 1992, filed an application for summary judgment under O. 14.

Held:

[1] There was no undue delay in the taking out of the O. 14 application. The delay of 5 or 6 weeks was not inordinate or undue. In any case the explanation given for the delay was acceptable to the Court.

[2] The notice of 5 March 1991 purporting to terminate the lease agreement was valid.

a. The submission of invalidity was irrelevant as the defendant was party to the consent order which recognised the termination of all aspects of the lease agreement. Even assuming it was relevant, there was still no need for a trial to conclude that the termination of the agreement in the case of an invocation of clause 18(2) or (3) took place with immediate effect upon the service of the notice.

b. The fact that the notice was hand delivered, and not posted, telexed or cabled, as provided by the lease agreement, was important only as far as proof of receipt of the notice was concerned. There had to be proof of actual receipt. The written acknowledgment of receipt by the defendant provided unchallenged proof of actual receipt of the notice.

c. Further and in any event, in the face of the provisions in the consent order, to suggest that there was a triable issue on whether the notice was valid or not was a *non-sequitur*. The real question was whether the lease agreement had come to an end.

[3] The foreign law point taken by the defendant did not raise a triable issue. Though the lease agreement provided that English law was to apply, it did not follow that O. 14 procedure was not suitable.

a. Where the question of law raised is not a difficult one, then even if foreign law is involved, the Court should not be inhibited from pronouncing on it even though expert evidence on the point has not been called.
b. In any event, the burden of proving foreign law lies on the party who bases his claim or defence on it. There is a presumption that foreign law is the same as Malaysian law. It has therefore to be proved by oral testimony. The onus is on the party who pleads the difference to prove it to the satisfaction of the Court.
c. A foreign law point taken does not *per se* entitle a defendant to a trial. An attempt should have been made to show what difficulty had been raised by the provision that the lease agreement was governed by the English law, and this the defendant had not done.

[4] The complaint that the amount claimed as incurred in the shipment of the equipment was unreasonable did not provide any *bona fide* triable issue. In the circumstances of the case, the conduct of the defendant had the effect in law of an estoppel that prevented the defendant from complaining in respect of the amount said to have been incurred.

[5] The allegation that the plaintiff had at some earlier date cheated the defendant of certain monies due to it did not have any relevance to the issues in respect of the claim.

[Appeal dismissed with costs].

Cases referred to:
Western National Bank v. Perez 6 TLR 366 ***(refd)***
Lloyd v. Guibert [1865] LR 1 QB 115 at 129 ***(refd)***
Dynamic AG v. Rio Tinto Co. [1918] AC 260 at 295 ***(refd)***
The Parchim [1918] AC 157 at 161 ***(refd)***
Casey v. Casey [1949] P.420 at 430 (CA); [1949] 2 All ER 110 ***(refd)***
Lin Securities (Pte) v. Noone & Co. Sdn. Bhd. [1989] 2 CLJ 844 / [1989] 1 MLJ 321 at 323 ***(refd)***
Elders Keep v. Luen Mei Plastic Industries Sdn. Bhd. [1989] 2 CLJ 1005 at 1008 ***(refd)***

Other sources referred to:
White Book 1973 @ 14/3-4/0

For the plaintiff - K. Shanti Mogan; M/s. Shearn Delamore & Co
For the defendant - Zainal Abidin b. Jamal (K.W. Chow with him); M/s. Zainal Abidin & Co.

JUDGMENT

V.C. George J:
This is an appeal against the O. 14 judgment that the plaintiff was granted in respect of the sum of £10,707.91 claimed to have been incurred by the plaintiff as costs of the carriage, insurance and freight of shipping certain equipment from Port Klang to the United Kingdom. Interest and costs were also claimed and awarded.

By a written agreement dated 11 September 1985 the plaintiff had leased to the defendant certain specialised equipment for use in its business of the manufacture and supply of what is described as metal cladding and related systems relevant in the building and construction industry. The lease agreement further *inter alia* granted the defendant licensee rights in certain intellectual property belonging to the plaintiff pertaining to certain technical information and in respect of certain trade names.

The agreement was to be effective for a fixed term of 3 years and thereafter either party was entitled to terminate it by giving not less than 3 calendar months notice to the other. This was provided by clause 18(1).

Clause 17 *per se* gives the plaintiff lessor licensor the right to terminate the agreement if there is imposed what is referred to in the agreement as "changes in the law" that has the effect of affecting the position, the *status quo*, of the parties *vis-a-vis* the agreement and if the parties cannot agree to amendments to the agreement to meet such changes.

Clause 18(2) *per se* provides *inter alia* that where the lessee licensee fails to pay any sum due under the agreement on its due date or is in breach of any other term of the agreement, the lessor licensor is entitled to terminate the agreement by serving a notice to that effect on the lessee licensee. Clause 18(3) provides the lessee

licensee with a reciprocal right to terminate where the lessor licensor is *inter alia* in breach.

Clause 2(5)(p) provides that:

> Upon termination of the leasing of the equipment under clauses 17 or 18 or on expiration of the lease term, the Licensee shall be responsible for the costs of properly insuring and redelivering the equipment to the Licensor at such address within the United Kingdom as the Licensor may direct ...

There is a qualification built into clause 18(1) which is that that provision has no application if the agreement had been previously terminated pursuant to clause 17 or clause 18(2) or (3).

By a notice dated 5 March 1991 (which is well after the initial 3 years of the agreement) the plaintiff through its solicitors purported to terminate the agreement with "immediate effect". The notice was hand delivered to the defendant on 6 March 1991. The plaintiff was purporting to invoke clause 18(2). The basis for the notice was stated therein to be the failure to remit by the due date *inter alia*, the sum of £56,925 due and payable under the agreement. When remittance was not made even after the notice was delivered the lessor licensor caused a writ to issue against the lessee licensee in Commercial Division Court No. 2 being CS 22-467-91. On 6 May 1991 the parties reported to the Court that a settlement of the claim had been arrived at and by consent it was *inter alia* ordered that the lessee licensee (who was the defendant there as well as here) pay the lessor licensor (the plaintiff there and here) the £56,925 and that the defendant would effect delivery of the equipment suitably and adequately packed for overseas delivery FOB Port Klang. The consent order expressly reserved to the plaintiff "the right to recover the costs of freight, insurance and carriage of the equipment from FOB Port Klang to CIF Llandybie, Ammanford, Dyfed, Wales."

Another provision in the consent order which was held out to be relevant to the issues before me was that clause of the consent order that provided that the "remaining provisions of the 1985 Agreement shall be terminated with effect from 31 May 1991".

Soon after the consent order was made the equipment was dismantled and packed for shipping to the United Kingdom. On 22 May 1991 the plaintiff's Export Sales Manager sent by fax a message to the defendant informing it that the equipment is to be shipped by the "Liverpool Bay" with the plaintiff as consignee c/o its shipping and forwarding agents, Glenewes Exports of Leeds England who apparently were the same shipping and forwarding agents that had been used by the plaintiff when the equipment was originally shipped from United Kingdom to Port Klang in 1985. The defendants were the Consignees then. The defendant does not appear to have objected to the use of the Leeds shipping and forwarding agents appointed by the plaintiff or to using the "Liverpool Bay" to ship the equipment back to the United Kingdom. In fact the defendant appears to have gone along with the plaintiff's instructions as to the vessel and the agents to be used and had on or about 1 June 1991 prepared and sent to the plaintiff as "Consignee" a draft invoice in respect of the equipment which stated that the vessel "Liverpool Bay" is to be used and that the shipping agents were to be Glenewes Exports of Leeds and on the basis that one 40 foot container and two 20 foot containers were to be used. In the draft invoice which obviously was needed to enable the consignee to obtain custom's clearance at the United Kingdom port, the defendant itself had estimated the cost of the carriage, insurance and freight to be RM36,000, that is, for one 40 foot container and two 20 foot containers. Apparently it turned out that in fact two 40 foot containers and one 20 foot container had to be and were used.

By a letter dated 28 October 1991 the plaintiff's solicitors wrote to the defendant's solicitors referring to clause 2(5)(p) of the agreement and to clause 3 of the consent order that had reserved to the plaintiff the right to claim for the costs of carriage, insurance and freight. The letter went on to state that the solicitors were instructed that the plaintiff had incurred the sum of £10,707.91 as such costs for shipping the equipment back to the United Kingdom and payment of that amount was demanded. No letter in reply has been exhibited and there has been no reference to any such letter in the O. 14 proceedings or in this appeal. The amount was not paid as demanded or at all and about two months later on 24 December 1991, the plaintiff caused the writ herein to issue seeking judgment for the £10,707.91, interests and costs.

Now, an appearance was entered on 23 January 1992 and a statement of defence and counterclaim dated 27 January 1992 was filed on or about 31 January 1992. Shortly after that the

plaintiff appeared to have realised that certain dates given in the statement of claim were incorrect. They applied for and obtained leave to amend the statement of claim and thereafter the application for summary judgment was filed on 9 March 1992.

Before me the point was taken that there was undue delay in taking out the O. 14 application. In response to this, the need to amend the statement of claim was given as the explanation for the delay and it was pointed out that the O. 14 application was filed as soon as the order to amend was obtained. The O. 14 application could have been filed sometime about the end of January 1992. It was filed on 9 March 1992. I do not consider a 5 or 6 weeks delay inordinate or undue but an explanation for it is called for. I accepted the explanation that was given from the Bar by Counsel for the plaintiff.

It was submitted for the defendant that the notice of 5 March 1991 that purported to determine the lease agreement was invalid both because it was purported to be "with immediate effect" and because it was hand delivered. I pause to question the relevance of the submission in the face of the fact that the defendant was party to the consent order which recognises the termination of all aspects of the agreement by 31 May 1991.

Be that as it may and assuming that the submission is relevant, clause 18 of the agreement has to be looked at again and the relevant portions of it are reproduced:

> 18(1) Unless previously terminated pursuant to clause 17 above or sub-clauses (2) or (3) below, this agreement shall continue for an initial period beginning with the date of this agreement and ending on the third anniversary hereof and thereafter shall continue unless and until either party gives to the other not less than three calendar months' notice expiring on or after the third anniversary of the date of this agreement and upon the expiration of such notice,
>
> (a) the licensee's right to lease all or part of the equipment under this agreement shall be determined and
> (b) clauses 3, 4 , sub-clause (1) to (3) inclusive of clause 5, clauses 6, 7, 8 and 11 of this agreement shall terminate.
>
> (2) If:
>
> (a) the Licensee fails to pay any sum due under this agreement on its due date; or
> (b) the licensee is in breach of any other term of this agreement; or ...
> (e) the licensee has a receiving order made against it or becomes or is declared insolvent or calls a meeting of or makes any arrangement or composition with its creditors or is wound up or has a receiver appointed ...
>
> ... then at any time thereafter the Licensor may serve a notice on the Licensee
>
> (i) determining its right to lease all or part of the equipment under this agreement and
> (ii) terminating clauses 3, 4 sub-clause (1) to (3) inclusive of clause 5, clauses 6, 7, 8 and 11 of this agreement.
>
> (3) Upon the expiration of any such notice as is referred to in sub-clause (1) above or upon service of any such notice as referred to in clause 17 above or sub-clauses (2) and (3) above:
>
> (a) the Licensor may, without prejudice to clause 2(5)(p) above and without notice, retake possession of the equipment ...
>
> (4) Service of any such notice as is referred to in sub-clauses (1) to (3) above shall be without prejudice to the rights of each party against the other which may have accrued up to the date of expiration of such notice (in the case of service of notice under sub-clause (1) above) or (in any other case) of service of such notice.

It is clear that what was agreed by clause 18(1) was that the period of the agreement was a fixed term of 3 years after which either party is entitled to terminate it by giving not less than 3 calendar months' notice. However, clause 18(2) in effect provides that although the agreement is for a fixed term, in the event the lessee licensee is in breach of any of the terms of the agreement (or on certain specified events happening e.g. the lessee licensee becomes insolvent or has a receiving order made against it or is wound up and so on) then at any time after such breach (or happening) the lessor licensor is entitled to terminate the agreement by serving a notice to that effect on the lessee licensee. Clause 18(3) is reciprocal and provides for the lessee licensee to terminate on breach of terms by the lessor licensor (or on certain specified events happening) by service of a notice at any time thereafter. It is inarguable that *per se* clauses 18(2) and 18(3) may be invoked at any

time while the agreement is on going or continuing provided there is such breach or happening. It is equally inarguable that *per se* nothing in clause 18(2) or 18(3) has the effect of restricting the invocation of those clauses to the initial 3 year period.

However it was submitted on behalf of the defendant that the first limb of clause 18(1) has the effect of restricting the invocation of clauses 18(2) and 18(3) to only the initial 3 years. The words referred to are:

> 18(1) Unless previously terminated pursuant to ... sub-clauses (2) or (3) below the agreement shall continue for an initial period (of 3 years) ...

Those words have the effect of providing a proviso or qualification to clause 18(1) - the agreement is for a period of not less than 3 years unless it is terminated earlier by the invocation of either clause 18(2) or 18(3). But that is not to say or have the effect that the invocation of clause 18(2) or 18(3) may not be made after the initial 3 years term. Those words in the first limb to clause 18(1) do not have the effect of in anyway qualifying or restricting the effect or application of either clause 18(2) or (18(3) as submitted or at all. Those sub-clauses could be invoked if there is a basis for doing so at any time while the agreement subsists. Accordingly, on 5 March 1991, although it was well after the initial 3 years of the agreement, if in fact there was a breach of the terms of the agreement on the part of the lessee licensee the lessor licensor was entitled to invoke clause 18(2) and terminate the agreement. There is no need for a trial to arrive at this conclusion.

Now in effect clause 18(1) entitled either party to terminate, without cause as it were, if that party "gives to the other not less than 3 calendar months' notice" provided the initial 3 years had been completed. Where termination is to be effected pursuant to clause 18(2) or clause 18(3) (for cause as it were) what is provided is that the party invoking the sub-clause "may serve a notice" on the other. The agreement does not state what the period of such notice has to be. It would seem clear that the intention and effect is that in the former case the giving of not less than 3 calendar months' notice will have the desired effect whereas in the latter the act of serving the notice will have the desired effect. This is confirmed by clause 18(4) and further has the approbation of common sense, commercial prudence and logic in that where there has been a breach of the terms and especially where the lessee licensee has become insolvent or is wound up and so on, it makes good commercial sense that the relationship comes to an abrupt end upon service of a notice to that effect. Clause 18(4) specifically and without leaving room for doubt spells out that in the former of the two cases the agreement comes to an end "on the expiration" of the period of notice (of not less than 3 calendar months) whereas in the latter case it comes to an end "upon service" of the notice. This is re-confirmed by the provisions of the second sub-clause (4) (which obviously is erroneously numbered as (4) and is in fact the fifth sub-clause to clause 18) - the preservation of rights by this sub-clause is as accrued up to the date of "the expiry of the notice period" in the case of clause 18(1) termination and up to "the service of the notice" in the case of a clause 18(2) or 18(3) termination.

In my judgment there is no need for a trial to conclude as I do that the termination of the agreement in the case of an invocation of clause 18(2) or 18(3) takes place with immediate effect upon the service of the notice.

The next point to be dealt with is the challenge to the validity of the notice in that it was hand delivered and not posted, telexed or cabled. Clause 21 which was referred to is as follows:

> 21. Any notice or communication under or in connection with this agreement shall be in writing and shall be delivered by post, telex or cable to the address given in this agreement or at such other address as the recipient may have notified to the other party in writing. Proof of posting or despatch shall be deemed to be proof of receipt:
>
> (a) in the case of a letter, on the fourteenth day after posting;
> (b) in the case of a telex or cable, on the day following the date of despatch.

There can be no doubt that one of the more reliable methods for delivery of a written notice or communication is to have it hand delivered. In the context the effect of clause 21 is not to preclude the parties from using other methods of delivery of written notices or communications other than those prescribed in the clause. Certainly the lessee licensee is not precluded from accepting other methods of service of notices and communications on it. The whole point of clause 21 is that if one of the 3 methods of

communication prescribed in the clause is used the deeming provision may be relied on without proof of actual receipt of the notice or communication. If other methods are used, there has to be actual proof of receipt of the notice. Here there is a written acknowledgment of receipt by the defendant of the notice in question and it is common ground that the notice was in fact received. The plaintiff does not have to rely on the deeming provision. It has provided unchallenged proof of actual receipt of the notice.

Further and in any event the real question at this stage is whether the agreement has come to an end. In the face of the provisions in the consent order that has been referred to earlier, in particular that the remaining provisions of the agreement shall be terminated with effect from 31 May 1991, to suggest that there is a triable issue on whether the notice is valid or not is a *non-sequitur*. It is of academic interest only.

A point taken before me was that as a term of the lease agreement provided that in respect of it English law applied it follows that O. 14 procedure is not suitable. No doubt Counsel had in mind the often quoted passage from the **White Book** - see 1973 **White Book** at 14/3-4/0 -

> Question of law - leave to defend would be given where a difficult question of law is raised ...; e.g. whether the claim is in respect of a gambling transaction; or depends on foreign law.

Western National Bank v. Perez 6 TLR 366 is cited in support of the last limb of the above extract from the **White Book.** In that case, certain alleged peculiarities pertaining to the law of partnership of New York had been referred to as being relevant and applicable and which it was submitted would absolve the defendant. The Master held that that provided a triable issue. It was in the face of that that Lord Coleridge said it was impossible for the Court to try a question as to the law of New York on affidavits.

The thrust and effect of that paragraph in the 1973 **White Book** is that where the question of law raised is not a difficult one, then even if foreign law is involved, the Court should not be inhibited from pronouncing on it even though expert evidence on the point has not been called.

In any event the burden of proving foreign law lies on the party who bases his claim or defence on it. In the English case, *Lloyd v. Guibert* [1865] LR 1 QB 115 at 129 it was held that if the party basing his claim (or defence) on foreign law adduces no evidence or insufficient evidence of the foreign law, the Court applies English law. Some English Courts have gone to the extent of stating that there is a principle that foreign law is presumed to be the same as English law until the contrary is proven, e.g. *Dynamic AG v. Rio Tinto Co.* [1918] AC 260 at 295, *The Parchim* [1918] AC 157 at 161 and *Casey v. Casey* [1949] P. 420 at 430 (CA); [1949] 2 All ER 110. In *Lin Securities (Pte) v. Noone & Co. Sdn. Bhd.* [1989] 1 MLJ 321 at 323 it was *inter alia* held that if Singapore law applies (as was submitted on behalf of the defendants opposing an O. 14 application) then that alone provides sufficient cause to deny the plaintiff summary judgment. That holding by me in that case must be read to apply in the context and facts of that case where it has to be noted that it had been submitted that the transaction, the subject of the action, was illegal. Reference was made to directives given for the conduct of certain type of transactions in the Singapore Stock Exchange referred to as forward contract and off-market contracts which directives were by way of written releases issued by the Chief Executive of the Stock Exchange and by its General Manager and it was submitted that these directives had the force of law in Singapore and that the transactions in question had contravened the directives. It was in the face of the evidence of such releases and the possibility that the directives might have the force of law in Singapore that it was held that itself provided a triable issue. The judgment, it must be noted, went on to state at p. 323, before making its ruling,

> As far as Malaysian law is concerned I am not aware that a forward contract or an off-market contract is illegal. But it has been brought to the attention of the Court without challenge that the Singapore Stock Exchange had released a directive to the effect that such contracts are prohibited.

I also had occasion to deal with a similar point in *Elders Keep v. Luen Mei Plastic Industries Sdn. Bhd.* [1989] 2 CLJ 1005 at 1008 where I had referred to the rule that required foreign law to be proved by oral testimony and went on to state:

> While there is indeed such a rule it has to be considered in the light of the presumption that foreign law is the same as Malaysian

law. **Private International Law** by Cheshire & North, 10th Edn. sets out the proviso to the rule as follows at p. 127

> The established rule is that knowledge of foreign law, even of the law obtaining in some other part of the Commonwealth is not to be imputed to an English Judge. Unless the foreign law with which a case may be connected is pleaded by the party relying thereon, then it is assumed that it is the same as English law. The onus of proving that it is different, and of proving what it is, lies upon the party who pleads the difference. If there is no such plea, or if the difference is not satisfactorily proved, the Court must give a decision according to English law, even though the case may be connected solely with some foreign country.

In a note to this passage the learned authors refer to *National Shipping Corporation v. Arab* [1971] 2 LL.L Reports 363 to suggest that the proviso may not apply where the plaintiff asks for summary judgment. With respect I do not think that National Shipping Corporation amounts to that. There the triable issue was whether Saudi Arabian or Pakistani law applied and some attempt was made to set out by affidavit what the relevant Saudi Arabian law on the subject was and what the Pakistani law on it was, the affidavits in each case suggesting that the law on the subject was different from English law. It is in that background that Lord Justice Davies ended his judgment by stating:

> I think it is equally, if not more difficult, for the Court to try a question as to what is the law of Saudi Arabia, if it applies, or what is the law of Pakistan, on affidavit.

In the instant case no attempt has been made to show what difficulty has been provided by the provision that the agreement is governed by and to be construed in accordance with English law. The foreign law point taken does not *per se* entitle the defendant to a trial.

What is left is, I think, the real complaint of the defendant put up as an issue for trial and that is that the £10,707.91 is an unreasonable amount. It was contended that it is common knowledge that "the costs of shipment in Malaysia are more competitive than in the United Kingdom". It was contended that the plaintiff did not obtain quotations from other shipping agents let alone Malaysian shipping agents.

Well after the writ was served on the defendant, its agents obtained on or about 15 February 1992 quotations in respect of ocean freight Port Klang/United Kingdom from 3 different shipping companies. The quotations are exhibited. The amounts quoted are significantly lower than the amount the plaintiffs say was incurred by them. However, in what context were the quotations obtained, is not explained. Are they as at 15 February 1992 or eight months earlier when on 19 April 1991 Glenewes Exports gave its quotation to the plaintiff - see DSM-2 to encl. (20), or as at date of sailing in about May 1991 or is it as to some other date?

In any event the Court cannot ignore the fact that ocean freight rates are prone to fluctuations and quotations from ship to ship could vary (as can readily be seen from the quotations submitted by the defendants themselves). Shipping rates have tagged to them fluctuating factors one of which is the CAF referred to in the quotation the defendants had obtained. During the Gulf War it was notorious that shipping rates went up to astronomical figures. In the instant case what is needed are comparable figures in respect of the relevant time which is April/May 1991. On the face of it 15 February 1992 quotations do not provide a reliable basis for the Court to hold that there is a triable issue as to the reasonableness of the amount claimed.

I pause to note that defendants do not say that the amount was not incurred. The point they seek to make is that it is an unreasonable sum. Counsel for the plaintiffs has informed the Court at the hearing that if there had been any suggestion that the £10,707.91 had not been paid she could have exhibited the receipt which was with the plaintiff's solicitors.

The conduct of the defendant has the effect in law of an estoppel that prevents the defendant from now complaining in respect of the amount said to have been incurred. They knew that an OCL ship was to be used. They knew that Glenewes Export was to be used. If it was common knowledge that Malaysian shipping companies would charge lesser rates why did not the defendants protest. Why did they allow the equipment to be shipped on the "Liverpool Bay". Why did they not check on the rates? They themselves estimated that the costs would be for one 40 foot container and two 20 foot containers RM36,000. Looking at the quotations they obtained in February 1992 it is seen that the costs of shipping one 40 foot container is almost double the cost of one 20 foot container. On that

basis, to their estimate of RM36,000, must be added the further cost of one 20 foot container amounting to say RM9,000 to get a total of RM45,000. At current rates of exchange (£1 = RM3.85) that is equivalent to over £11,000. In 1991 the exchange rates of pounds sterling and US dollars in relation to the Malaysian Ringgit was probably different from the current rates. That is another fluctuation that the defendants do not appear to have taken into account. They have not informed the Court what the relevant exchange rate was. In April/May 1991 if the rate was RM4.50 to the pound the estimate of the defendants themselves amounts to something like £10,000 which is not far out from the actual amount said to have been incurred by the plaintiffs. The defendants allowed the equipment to be shipped by an OCL vessel and they cannot now say a tramp or in any event a non-conference vessel should have been used. This point also does not provide any *bona fide* triable issue.

For the defendant much was sought to be made of an allegation of the plaintiff having at some earlier date cheated the defendant of certain monies due to it. I failed to see the relevance of that in respect of the issues in respect of this claim.

The appeal had to be and was dismissed with costs.

Reported by Shamsiah Begum Subhan

LIONG PONG HUONG

v.

NYAN SIU LAN @ NGAN SIEW LAN (F) AND WONG SIEW LENG (F) (INTERVENER)

HIGH COURT, KUCHING
TUAN RICHARD MALANJUM JC
[SUIT NO. KG. 164 OF 1983
CONSOLIDATED WITH SUIT NO. KG 599 OF 1986]
7 AUGUST 1993

CONTRACT: Whether agreement a sham - Plaintiff knew what he was signing - Sanctity of agreement - No dealing clause - Effect of such restriction.

Pursuant to an agreement dated 8 January 1974 (said agreement) the plaintiff sold to the defendant a parcel of land together with a double storey semi-detached house (said property). The plaintiff admits that the said agreement was explained to him by a lady in the lawyers' office and that he knew what he was signing. But the plaintiff also says that he was signing for the purpose of obtaining a loan. Subsequently the defendant entered into an agreement with the intervener to sell the said property to her.

The plaintiff filed the suit to declare the said agreement null and void on the grounds that the agreement was a sham and was only to better secure the loan of RM5,000 given to him by the defendant. Also on the ground that the document of title has a "no-dealing clause".

Held:

[1] Having considered the conduct of the parties, and the circumstances on the balance of probabilities the said agreement is not a sham designed to better secure a loan taken by the plaintiff from the defendant.

[2] Clause 2 of the agreement clearly stipulated that the sum of RM8,000 was paid and the receipt was thereby acknowledged. The plaintiff admitted knowing what he was signing and as such he should be bound by it. The sanctity of legally binding agreements should be protected and no one should be allowed to retract from them by mere denial without more.

[3] Pursuant to clause 3 of the said agreement the parties left it open-ended and flexible with